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Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

WARNER D. ORVIS, HOMER W. ORVIS and SCHUYLER A. ORVIS, Executors of the Last Will and Testament of Edwin W. Orvis, deceased,

Petitioners,

vs.

JOSEPH T. HIGGINS, Individually and as former Collector of Internal Revenue for the 3rd District of New York.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered on February 2, 1950 (432). The said judgment reversed and remanded the judgment of the District Court. Petition for Rehearing was denied on February 20, 1950 (442).

Opinions Below

The opinion of the trial judge is reported in 80 F. Supp. 64. The majority opinion of the Court of Appeals appears in the record at page 424. The dissenting opinion of Circuit Judge Chase appears at page 431.

Jurisdiction

The jurisdiction of this Court in invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Upon the facts disclosed by this record was the Court of Appeals justified in setting aside as "clearly erroneous" findings of fact of the trial judge that the trust created by decedent and the trust created by his wife were not reciprocal?

Statute and Rule Involved

The pertinent provisions of Internal Revenue Code, Section 811(c).

Rule 52(a) of the Federal Rules of Civil Procedure.

Statement

Petitioners recovered judgment in the District Court in an action brought for the refund of deficiency estate taxes assessed against the Estate of Edwin W. Orvis and paid by the petitioners as Executors. On appeal the Government asserted but two defenses: (1) the "reciprocal trusts" defense and (2) the "contemplation of death" defense. The Court of Appeals considered only the former defense (431).

The evidence, which consists in large part of facts neither side disputes, may be summarized as follows:

On December 19, 1934, the decedent created a trust and transferred thereunder to Empire Trust Company and Arthur E. Orvis, as trustees, securities of the face value of $300,000. This trust agreement provided for payment

of income to the wife of decedent during her lifetime and upon her death the principal to be paid over to the issue of the settlor.

On December 13, 1934, Carrie E. Orvis, wife of decedent, created a trust and transferred thereunder to Fifth Avenue Bank of New York and Warner D. Orvis, as trustees, securities of the face value of $250,000. This trust agreement provided for payment of income to decedent during his lifetime and upon his death the principal to be paid over to the issue of the settlor.

About the latter part of November, 1934, Mrs. Orvis spoke to her son Arthur about making a trust. She told him she had received communications from various trust companies pointing out that there would soon be an increase in gift taxes. She expressed concern about economic conditions (89, 90). Also about November, 1934, she discussed the making of a trust with Mr. Merritt, the attorney for Mr. and Mrs. Orvis, who had prepared previous trusts for Mr. Orvis and had likewise previously prepared two trusts for Mrs. Orvis for the benefit of her two sisters. She stated to Mr. Merritt her reasons for wanting to make another trust (106, 107). In preparing the trust agreement Mr. Merritt made use of a form of trust indenture obtained from the Fifth Avenue Bank and followed Mrs. Orvis' instructions as to the terms of the trust (107).

Also about November, 1934, Mrs. Orvis conferred with her son Warner concerning a trust she contemplated making and requested him to serve as one of the trustees (136). She explained to him her reasons for wanting to make this trust (146). They discussed securities that Mrs. Orvis proposed to put in the trust (146) and Warner suggested to his mother, since Mr. Orvis had talked to Mr. Merritt about a trust that he was proposing to establish, that she consult with them about her proposed trust (146, 147). Apparently acting upon Warner's suggestion she discussed the matter of her proposed trust with her husband (146-8).

Decedent was not present at the time Mrs. Orvis executed the December 13, 1934, trust agreement at the Fifth Avenue Bank (137).

In the fall of 1934 the decedent talked with his son Warner about making another trust and mentioned the subject of gift taxes or their impending increase (135). He first spoke to his son Arthur about the December 19, 1934, trust three or four days prior thereto and requested that he serve as co-trusteee (92, 93). At about the same time decedent discussed with his attorney Mr. Merritt the matter of creating another trust and explained to him his reasons therefor (108). On that same occasion the decedent said to Mr. Merritt: "Now you drew up a trust for Mrs. Orvis (referring to the trust of December 13, 1934). Now I want you to draw up a trust for me. I have decided that I am going to make a trust with the Empire Trust Co. You prepare that. You can do this quickly for me. You have got the form from the Fifth Avenue Bank and that form ought to be satisfactory to the Empire Trust. Will you draw that up for me?" (121).

Specification of Error to Be Urged

The Court below erred in holding that the trial judge's findings that the decedent and his wife each pursued an independent course in creating the 1934 trusts and that no reciprocity was intended, were "clearly erroneous" and that each trust was made in consideration of the other.

Reasons for Granting the Writ

Petitioners contend that this case involves a question of general importance with respect to the application by an appellate court of Rule 52(a) of the Federal Rules of Civil Procedure which provides that findings of fact shall not

be set aside unless "clearly erroneous" and that due regard should be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The decision of the Court below appears to be in conflict with the applicable decision of this Court in the case of *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949).

The trial judge, after long and painstaking consideration of all the evidence, oral as well as documentary, concluded that the 1934 trusts were not reciprocal; that each trust was conceived and executed as the independent act of the settlor. The record evidence satisfactorily explains the motives which prompted decedent and his wife to make these two trusts.

Even if it be assumed that upon all the evidence the trial judge would have been justified in finding either way, he did in point of fact decide in favor of petitioners, and, there being sufficient evidence to support such finding, the Court of Appeals erred in setting that finding aside.

This Court in *United States* v. *Yellow Cab Co.*, supra, made the following pertinent observation:

> "While, of course, it would be our duty to correct clear error, even in findings of fact, the government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way, but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous'."

While a majority of the Court below held that a review of the record left a "definite and firm conviction" that a mistake had been committed by the trial judge (*U. S.* v. *Gypsum Co.*, 333 U. S. 364 (1948)), petitioners contend that the judgment should have been affirmed for the reasons so concisely outlined by the dissenting circuit judge who quite

properly stated that this case is a typical instance for the application of Rule 52(a).

Wherefore it is respectfully respectfully submitted that this petition should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 798

WARNER D. ORVIS, HOMER W. ORVIS AND SCHUYLER A. ORVIS, EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDWIN W. ORVIS, DECEASED, PETITIONERS

v.

JOSEPH T. HIGGINS, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE 3RD DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the District Court (R. 363-385) are reported at 80 F. Supp. 64. The opinion of the Court of Appeals (R. 424-431) is reported at 180 F. 2d 537.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1950 (R. 432). A petition for rehearing was denied on February 20, 1950 (R. 442, 444). The petition for a writ of certiorari was filed on May 4, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the Court of Appeals erred, under Rule 52 (a), Federal Rules of Civil Procedure, in rejecting an ultimate finding of fact of the District Court that decedent and his wife did not intend to create reciprocal trusts where, assuming the credibility of all witnesses, it was firmly convinced from all the facts that the finding was clearly erroneous.

STATEMENT

The facts found by the District Court, so far as relevant to the issue involved here (R. 364-365, 374-376, 379-385), may be summarized as follows:

On December 13, 1934, decedent's wife, Mrs. Orvis, created a trust, naming decedent life beneficiary and their four sons as remaindermen. On December 19, 1934, decedent executed a similar trust in the same form, of which Mrs. Orvis was the life beneficiary and the remaindermen were again the four sons. Both transactions were arranged by the family attorney, Mr. Merritt, and neither the decedent nor his wife was present during the execution of the other's trust. However, both knew

of the intentions of the other prior to the time the trusts were settled. (R. 379-380.) The value of Mrs. Orvis' trust of December 13, 1934, was $250,000 (R. 383), and that of decedent's trust of December 19, 1934, was $300,000 (R. 364).

Prior to the establishment of the trusts, both decedent and Mrs. Orvis had conferred with their sons Arthur (R. 380-381) and Warner (R. 381-382), with their family attorney, Mr. Merritt (R. 382-383), and with each other (R. 379-380, 382). Both stated to Merritt that their reasons for creating the trust were anxiety over political, economic, and financial conditions, a desire to travel and to be freed of the responsibility of managing part of their assets (R. 382-383). Both also expressed a desire to create the trusts before prospective increases in gift tax rates became effective (R. 380-381).

Neither decedent nor Mrs. Orvis stated to either of their sons, Albert or Warner, or to Merritt that he or she was creating the trust with a reciprocal intent, but the sons and Merritt did not testify affirmatively or positively that the settlors were not acting reciprocally in creating the trusts (R. 380-383, 384).

Mrs. Orvis died in 1938 (R. 368). The decedent died on April 29, 1939 (R. 363). The Commissioner determined that decedent's life estate in the trust created by Mrs. Orvis on December 13, 1934, caused the value of that trust to be includible in his gross estate under Section 811 (d) of the Internal Rev-

enue Code, because decedent's trust, created on December 19, 1934, and Mrs. Orvis' trust, were reciprocal trusts, each executed in consideration of the other (R. 364-365).

Relying primarily on the lack of affirmative evidence to establish that the two settlors acted reciprocally, the District Court found that they did not intend reciprocity in creating the trusts, and that the value of the corpus of Mrs. Orvis' trust was not includible in decedent's gross estate. (R. 384-385.) The Court of Appeals was convinced from all the facts that the two settlors did intend reciprocity and reversed. (R. 424-431.)

ARGUMENT

The Court of Appeals expressly assumed that all of the testimony of the witnesses was given full credence by the District Court (R. 428), as it had been (R. 367-368), but nevertheless pointed out that the irresistible inference compelled by the undisputed facts, treating all the testimony as fully credible, was that Mr. and Mrs. Orvis intended the trust created by each of them in December, 1934, to be reciprocal to the other trust (R. 428). The Court of Appeals noted (R. 428) that although the District Court rejected this inference, its finding that reciprocity was not intended was premised, not on positive testimony, of which there was none, that Mr. and Mrs. Orvis acted independently in creating their trusts, but instead merely on negative testimony that no intention to act reciprocally

was expressed vocally to any of the witnesses by either Mr. or Mrs. Orvis. Since the Court of Appeals treated all the testimony as credible, since the two trusts in fact contained reciprocal provisions and were executed on the same form at approximately the same time, with corpora closely corresponding in amount, after consultation between the settlors, and since there was no affirmative evidence that the two settlors had no intention to create reciprocal trusts, the Court of Appeals very properly, under Rule 52 (a) as construed in *United States* v. *Gypsum Co.*, 333 U. S. 364, 395, rehearing denied, 333 U. S. 869, gave effect to its "definite and firm conviction" under the undisputed facts that the District Court was mistaken and that reciprocity was intended.

United States v. *Yellow Cab Co.*, 338 U. S. 338, does not preclude the substitution by the Court of Appeals of its factual conclusion for that of the District Court in the circumstances of this case. On the contrary, this Court there reaffirmed the duty of the appellate court to correct a finding of fact which is clearly erroneous but summarized that case as being one in which the trial court's ultimate findings were not erroneous since the trial court had made factual choices between two permissible views, either of which would have been supported by the evidence, and since the findings, in so far as they related to intent, depended peculiarly upon the credit given to witnesses by the trial court. (Pp.

341-342.) As the opinion of the Court of Appeals makes amply clear, those circumstances are not present in this case. There is thus no conflict with the *Yellow Cab* decision.

CONCLUSION

The judgment of the Court of Appeals is in accord with the principles, governing review of findings of fact, enunciated by this Court. There is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1950.

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